NO. 90-551

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

McEvoy Travel Bureau, Inc.

V.

Heritage Travel, Inc.
Donald R. Sohn
and
Norton Company

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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Even if the respondents' basis for distinguishing every one of the cases petitioner cites to demonstrate there is a conflict in Circuits on the Question Presented is correct, the conflict still exists; the respondents have simply formulated an alternative Question Presented. The respondents' theory elevates the second "merits" issue specified in footnote 1 of the Petition, p. i, to a second Question Presented. [1]

The respondents say there is "No Conflict In The Circuits On The Question Presented" because "the injured party was also the party deceived" in every case cited by the petitioner to establish that six Circuits are in conflict with the decision below (Opp'n.. 8-10). To maintain that proposition--there there was such a unity of "defrauded party and injured party" in each case--the respondents must ignore the reality that in each of petitioner's cases the actual "defrauded party" or "deceived party" was "different than the injured party", different than the

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1 If necessary, petitioner requests that the Petition be considered to be so amended: that that second "merits" issue, originally "not presented as [a] reason to grant the writ", be now so considered because of respondents' argument in their Brief In Opposition.

"party who lost money" (Opp'n. 9).[2] The respondents manage to construct their identity of parties by just calling each "injured party" a "deceived party", just saying that each "victim" was "defrauded" for purposes of interpreting the mail and wire fraud statutes. Petitioner submits that, in truth, that is an exercise in Alice In Wonderland semantics ("words mean what I say they

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[2] The Court must, of course, read the cases, and can assure itself which parties' interpretations are correct, but two examples would appear to support petitioner's reading that the "deceived party" was different than the "party who lost money"--that respondents' claimed unity is nonexistent. (They are both even post-*McNally* cases, but nothing turns on that, as the Petition explains.) In *United States v. Cosentino*, 869 F.2d 301 (7th Cir.), *cert. denied*, 109 S.Ct. 3220 (1989), it is obvious that the Illinois Department of Insurance was the "deceived party" (the defendants "concealed from the Department", which was not "notified of changes", contracts were "not filed with the Department", etc. *Id.* at 303), while "the Kenilworth Insurance Company" (controlled by the defendants and undeceived, in any ordinary sense) was the "party who lost money,", not the Department. The court made this clear:

> Further, in misleading the Department of Insurance, the scheme permitted the agency ["Robco", also controlled by the defendants] to remain in business past the point it would have had the Department been aware of the defendants' activities--and that additional time allowed the defendants more time to take Kenilworth's [commission] money from the Robco account. *Id.* at 307

Similarly, in *United States v. Olantunji*, 872 F.2d 1161 (3rd Cir. 1989), the defendant "falsely represented to the Immigration and Naturalization Service ('INS')", "concealed from INS", that he married a United States citizen "for the sole purpose of gaining permanent resident status", on the basis of which "he thereby received [from the Department of Education] student aid [money] to which he would not have otherwise been entitled." *Id.* at 1162. The court held that the indictment sufficiently alleged a violation of the mail fraud statute, 18 U.S.C. §1341, because there was no need to "specifically allege that such false statements and representations were made directly to the ultimate victim, i.e., the D.O.E." *Id.* at 1168 (Emphasis in original).

mean"), but if the respondents' construction is correct, McEvoy Travel was also "deceived" or "defrauded", in the statutory sense, as being the "party who lost money." McEvoy equates to the "injured party" or the "victim" in each of the cited cases, and if they were "deceived" or "defrauded", so too was McEvoy. Each of the courts cited by petitioner would hold McEvoy was a "defrauded" party under the statutes under respondents' theory, and, since the lower court here rejected that alternative argument that a statutory violation is alleged (App. 14-15; 17-18; 50), the "conflict in Circuits" on this important question is just as starkly presented as it is by petitioner's characterization of the relevant holdings.[3]

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[3] McEvoy's principal argument in the court below that a "scheme...to defraud" violative of 18 U.S.C. §§1341, 1343, is here alleged focussed on the fact that the defendants' "scheme" had as its purpose stripping McEvoy of the Norton Company travel account by means of deceiving ATC and IATA into approving a "phoney" "in-plant" operation, while the "real" "in-plant" displaced McEvoy by arranging illegal rent and rebate payments to Norton (App. 34; 50). (That is the second "merits" argument originally specified in footnote 1 of the Petition, now an alternative reason to grant the writ.) Had McEvoy not been "deceived", been told by Norton and Heritage that they managed to get ATC and IATA approval of an "in-plant" operation involving illegal payments of rebates and rents, the "scheme...to defraud", thus exposed, would not have existed as the mechanism which, as alleged, caused McEvoy to lose its lucrative Norton travel account. McEvoy has always contended that it was the "defrauded party", even though not directly "deceived" by some misrepresentation, as were ATC and IATA--"defrauded" in a substantive sense under the statute, not in respondents' semantic sense. The "deceiving" of ATC and IATA, with McEvoy the "party deprived of money or property--the theory impressed by the lower court's holding and presented in the

The respondents, therefore, cannot make this "conflict in Circuits" disappear. One way or the other there is a pervasive conflict on a very important issue of Federal criminal law, and this case is a compelling vehicle for the Court to resolve this conflict and clarify its holdings in *McNally v. United States*, 483 U.S. 350 (1987) and *Carpenter v. United States*, 484 U.S. 19 (1987).

Lastly, respondents are quite wrong in arguing that "The Question Presented Does Not Reflect The Lower Court's Decision" (Opp'n. 6). They obfuscate to say that "The court of appeals decided only that the facts set forth in the complaint failed to allege a scheme to defraud anyone of property." (Opp'n. 6 - Emphasis in original). The court held that McEvoy was not "defrauded" because it was not directly "deceived" (App. 15-18), and, "the only parties deceived--the ATC and IATA--were not deprived of money or property", "*McNally* can[not] be satisfied by establishing the existence of a scheme to deceive one party, thereby depriving another of property." (App. 23). The latter holding is alleged to be erroneous as the

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Footnote 3 Continued
Petition--is an alternative approach to salvage dismissal of this bona fide action.

Question Presented in the Petition and the former is the error which is the subject of this Reply Brief.

Respectfully submitted,

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